Supreme Court, U.S.
FILED
JAN 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 86-393

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

JAMES B. STANLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

RICHARD KUPFER, ESQ.
Cone, Wagner, Nugent, Johnson, Roth & Romano P.A.
Servico Centre East
Suite 400
1601 Belvedere Road
P.O. Box 3466
West Palm Beach, FL 33402
(305) 684-9000
Counsel for Respondent

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(212) 633-2217
Counsel for Petitioners

PETITION FOR A WRIT OF CERTIORARI FILED SEPTEMBER 9, 1986
CERTIORARI GRANTED DECEMBER 8, 1986

1811

TABLE OF CONTENTS*

	Page
1. Relevant Docket Entries from the United States Court of Appeals for the Eleventh Circuit	1
2. Relevant Docket Entries from the United States District Court for the Southern District of Florida	2
3. Plaintiff's Second Amended Complaint	3
4. District Court's Order Granting Motion for Certification under 28 U.S.C. 1292(b)	11
5. Court of Appeals' Order Accepting Interlocutory Appeal under 28 U.S.C. 1292(b)	13
6. Order Granting Certiorari	16

*The opinions and judgments of the court of appeals and of the district court are printed in the appendix to the petition for a writ of certiorari and have not been reproduced here.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5273

JAMES B. STANLEY, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS-APPELLANTS

RELEVANT DOCKET ENTRIES

4/21/86	AFFIRMED in pt., and REVERSED in pt.
6/17/86	ORDER DENYING REHEARING

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 78-8141-CIV-JAG

JAMES B. STANLEY, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS

RELEVANT DOCKET ENTRIES

Nov. 10, 1982	ORDER (JAG-11/09/82) Motion for Partial Final Judgment by Deft., USA is GRANTED; The clerk to enter final judgment in favor uf [sic] USA; Claims against individual defts. vacated and withdrawn. (EOD-11/15/82). (m-11/24/82).

BEST AVAIL

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 78-8141 CIV-JAG

JAMES B. STANLEY, PLAINTIFF,

v.

JOSEPH R. BERTINO, M.D.; BOARD OF REGENTS OF THE UNIVERSITY OF MARYLAND; H.D. COLLIER; ALBERT DREISBACH; BERNARD G. ELFERT; SIDNEY GOTTLIEB, M.D.; RICHARD HELMS; GERALD KLEE, M.D.; VAN SIM, M.D.; WALTER WEINTRAUB, M.D.; AND UNKNOWN INDIVIDUAL FEDERAL AND STATE AGENTS AND OFFICERS, DEFENDANTS.

FEB [illegible] 1983

SECOND AMENDED COMPLAINT

Plaintiff sues the Defendants and alleges:

JURISDICTIONAL STATEMENT

1. This action is brought pursuant to this Court's federal question jurisdiction, 28 U.S.C. § 1331, and pursuant to 42 U.S.C. § 1983, 1985, and arises under the Constitution of the United States.

VENUE STATEMENT

2. Plaintiff is a resident and citizen of the United States, State of Florida, County of Palm Beach. Defendant, JOSEPH R. BERTINO, M.D., is a resident and

ABLE COPY

citizen of the State of Connecticut; Defendant, BOARD OF REGENTS OF THE UNIVERSITY OF MARYLAND, is, upon information and belief, an agency or political subdivision of the State of Maryland; Defendants, SIDNEY GOTTLIEB, M.D., GERALD KLEE, M.D., VAN SIM, M.D., and WALTER WEINTRAUB, M.D., are, upon information and belief, residents and citizens of the State of Maryland. The remaining Defendants' identities and/or places of residences and citizenship are presently unknown.

COUNT I
(BIVENS ACTION)

3. In 1958, Plaintiff was a Master Sergeant in the United States Army, stationed with his wife and children at Fort Knox, Kentucky. Plaintiff had received multiple military honors, including the bronze star medal for valor, purple heart, good conduct medal and presidential unit citation. Plaintiff volunteered in February, 1958 to participate in a program at the Chemical Warfare Laboratories at Army Chemical Center, Aberdeen Proving Grounds, Edgewood Arsenal, the purpose of which was purportedly for development and testing of methods of defense against chemical warfare attack, including testing of various gas masks and protective clothing. Plaintiff was given a release from his regular duties to participate in the program.

4. The Defendants deliberately gave Plaintiff false information regarding the true nature of the covert program for which Plaintiff had volunteered. During interviews with military and civilian personnel at Edgewood Arsenal, Plaintiff was asked to drink a clear liquid which appeared to be a glass of water. Unbeknownst to Plaintiff, the liquid contained lysergic acid diethylamide, commonly known as LSD. Plaintiff unknowingly ingested the dangerous drug on four occasions during the month of

February, 1958 (believed to be on or about February 12, 19, 20 and 26, 1958) and experienced severe reactions including hallucinations, but he did not know the source of these reactions. Plaintiff was not informed of the true nature of the testing program nor the risks involved, and Defendants intentionally withheld such information since it was an integral part of the program to have the unwitting and uninformed subjects for testing.

5. The following month, Plaintiff returned to active duty at Fort Knox, but in an altered behavioral and emotional state. Plaintiff periodically lapsed into intervals of incoherency and had no recall of such events afterwards. The periods were sometimes marred by violence and, on occasion, Plaintiff would awake from sleep at night and, without reason, violently beat his wife and children, later being unable to recall the entire incident. Plaintiff was thereafter unable to perform his military duties efficiently and was reduced in rank for inefficiency. At times Plaintiff would be absent without leave and could not recall his whereabouts when questioned.

6. In 1969 Plaintiff was discharged from the Army, still unaware that he had been duped into ingesting LSD years earlier. From 1958 until his discharge in 1969, Defendants intentionally concealed this information from Plaintiff in order to continue to observe his "unwitting reaction." For this period from 1958 until 1969, Plaintiff, although uninformed, was at least in a position to be observed and monitored by Defendants as part of their covert program in human drug experimentation.

7. Upon and subsequent to Plaintiff's discharge from the Army in 1969, Defendants were grossly negligent in failing to debrief and inform Plaintiff of the 1958 episode and in failing to continue to monitor his condition as it would relate to his civilian life thereafter.

8. Plaintiff suffers continuing and permanent psychologial [*sic*] injuries long after the 1958 incident, due to Defendants' negligent failure to debrief him and to con-

tinue to monitor his condition after discharge, and to provide follow-up medical care or instruct Plaintiff to seek such medical care on his own. Plaintiff's bizarre behavioral changes eventually resulted in a breakdown and dissolution of his marriage and family life one year after his discharge, in 1970. Plaintiff suffers injury to this day and will continue to suffer in the future.

9. In December, 1975, Plaintiff received a letter from the Department of the Army, Walter Reed Army Medical Center, which disclosed for the first time that Plaintiff had been secretly given LSD during February, 1958. This was the first time Plaintiff realized that he had been used as an unwitting subject for the study of the long-range medical and psychological effects of LSD, rather than being merely a volunteer in testing chemical warfare equipment and clothing. The 1975 letter solicited Plaintiff's participation in a follow-up study of subjects who participated in the 1958 LSD experiments. This letter, however, did not disclose the names of the individual Defendants, whose names were recently discovered as set forth in paragraph 10, below.

10. Plaintiff filed administrative claims with the United States Army and the Central Intelligence Agency, which were denied. His administrative claim against the U.S. Army was denied with a statement that his claim was not compensable under any statute, regulation or appropriation available to the Army Claims Service, and the Claims Division advised Plaintiff, if he was dissatisfied, to file suit in the United States District Court. An FTCA suit was filed in 1978; however, all discovery has been stayed until the present so that Plaintiff was unable to discover the names of most of the Defendants until same became available on the record of *Sweet v. United States*, a similar case tried in South Dakota in 1982.

11. The wrongful act of the Defendants consists of an intentional act which [*sic*] Plaintiff was on active duty and

subsequent negligent failure to protect Plaintiff, after becoming a civilian, from the dire consequences flowing from the original wrong. The post-discharge negligence is a separate wrong occurring after civilian status was attained.

12. Defendants' post-discharge negligence aggravated and prolonged Plaintiff's condition.

13. Defendants knew, or should have known, that LSD is a consciousness and behavior altering drug capable of producing irreparably harmful results, including death, and that the drug would affect different persons in different unpredictable ways. Defendants negligently failed to debrief Plaintiff after his discharge to advise of the potentially hazardous physiological and psychological effects and the need for continued professional observation and treatment; and Defendants negligently failed to continue to monitor Plaintiff following his discharge.

14. The actions and omissions of the Defendants, federal executive department officials and agents, who were acting under color of a covert federal Army problem [*sic*] and pursuant to such program which was implemented by the United States Government, violated and deprived Plaintiff of his fundamental, justiciable constitutional rights as a citizen of the United States. It is such official policy that is responsible for the deprivation of Plaintiff's constitutional rights.

15. Plaintiff's constitutional right to privacy has been wrongfully invaded by Defendants' surreptitious administration of a dangerous, unpredictable hallucinogenic and behavior altering drug into Plaintiff's bloodstream. The privacy interest invaded is the most fundamental of all, to-wit, the right of bodily integrity and the right to control one's own intellectual thought process.

16. The introduction of LSD into Plaintiff's bloodstream involved considerable and unpredictable risk and trauma, in an attempt to alter or control the content

of Plaintiff's private thoughts. In this way Plaintiff's fundamental right to privacy of the mind and body has been recklessly, willfully and wantonly invaded by federal officers acting pursant to an adopted federal covert human drug experimentation program.

17. The constitutional right to privacy has been held to be implicit in the First, Third, Fourth and Ninth Amendments to the Constitution of the United States, and has also been held to be implicit in the concept of liberty within the Fifth Amendment Due Process Clause, and generally within the "penumbras" of the Bills [*sic*] of Rights. The right to privacy also protects marriage and family relationships.

18. As a direct and proximate result of this most destestable and outrageous violation of Plaintiff's constitutionally protected rights, Plaintiff has suffered damages, before and after his discharge from the Army, as follows: physical and mental anguish; disability and loss of capacity for the enjoyment of life; loss of working ability and consequent loss of income; the disruption and termination of a promising Army career; severe and permanent physical, mental and psychological injuries, said injuries are permanent and continuing in nature and Plaintiff will suffer from such losses and injuries in the future; and the disruption, breakdown and dissolution of Plaintiff's marriage and family life.

WHEREFORE, Plaintiff demands judgment against all Defendants for compensatory damages, punitive damages, attorneys' fees and costs of this litigation and further demands trial by jury.

COUNT II

(VIOLATION OF 42 U.S.C. § 1983)

19. Plaintiff realleges and incorporates each and every preceding averment and for an alternative cause of action alleges the following facts.

20. Upon information and belief, the unwitting human LSD testing program aforesaid was carried on by the Defendants pursuant to, or by means of, an agreement or contract between the BOARD OF REGENTS OF THE UNIVERSITY OF MARYLAND, its divisions, agencies, and/or employees, and one or more unknown federal agencies.

21. At all material times in the conduct of this program, the Defendants acted as independent contractors in that they maintained and exercised discrete operational control over the day-to-day conduct of the unwitting human LSD testing program, and in particular, in their dealings with the Plaintiff.

22. At all material times, the Defendants were employees of, as joint venturers with the BOARD OF REGENTS OF THE UNIVERSITY OF MARYLAND, a state agency, and acted at all times under color of law.

23. The Defendant's acts and omissions detailed in Count I hereof violated 42 U.S.C. § 1983 by depriving the Plaintiff of rights secured by the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments to the U.S. Constitution.

24. As a direct and proximate result of this outrageous behavior, Plaintiff was injured as more fully described in Count I, paragraph 18 of the Complaint.

WHEREFORE, Plaintiff demands judgment against all Defendants for compensatory damages, punitive damages, attorneys' fees and costs of this litigation and further demands trial by jury.

COUNT III

(VIOLATIONS OF 42 U.S.C. § 1985 – CONSPIRACY)

25. Plaintiff realleges and incorporates each and every preceding averment and for his third cause of action alleges the following facts.

26. The Defendants' acts and omissions aforesaid were committed in furtherance of a conspiracy among two or more of the Defendants to deprive the Plaintiff of the equal protection of the laws, or of equal privileges and immunities under the laws, so as to violate 42 U.S.C. § 1985.

27. As a direct and proximate result of such conspiracy among the Defendants, the Plaintiff was injured as more fully set forth in Count I, paragraph 18 above.

WHEREFORE, Plaintiff demands judgment against all Defendants for compensatory damages, punitive damages, attorneys' fees and costs of this litigation and further demands trial by jury.

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing has been furnished this 3rd day of February, 1983, to ALAN MISHAEL, ESQUIRE; JOHN L. EULER, ESQUIRE; JOHN J. FARLEY III, ESQUIRE; STANLEY MARCUS, ESQUIRE; Torts Branch—Civil Division, U.S. Department of Justice, Washington, D.C. 20530, (202) 724-6748; DAVID BULLOCK, ESQUIRE, Department of the Army (DAJA-LTM), Washington, D.C. 20310, (202) 695-1700; and J. PAUL McGRATH, Assistant Attorney General, Torts Branch—Civil Division, U.S. Department of Justice, Washington, D.C. 20530, (202) 633-3306.

CONE, WAGNER, NUGENT,
JOHNSON, HAZOURI &
ROTH, P.A.
507 North Olive Avenue
Post Office Box 3466
West Palm Beach, Florida 33402
(305) 655-8100
Attorneys for Plaintiff

By MICHAEL D. ERIKSEN, ESQ.
MICHAEL D. ERIKSEN
for JOHN F. ROMANO

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 78-8141 CIV-JAG

JAMES B. STANLEY, PLAINTIFF,

v.

JOSEPH R. BERTINO, M.D.; BOARD OF REGENTS OF THE UNIVERSITY OF MARYLAND; H.D. COLLIER; ALBERT DREISBACH; BERNARD G. ELFERT; SIDNEY GOTTLIEB, M.D.; RICHARD HELMS; GERALD KLEE, M.D.; VAN SIM, M.D.; WALTER WEINTRAUB, M.D.; AND UNKNOWN INDIVIDUAL FEDERAL AND STATE AGENTS AND OFFICERS, DEFENDANTS.

FEB 27, 1984

ORDER

THIS MATTER came on before the Court upon defendants' Motion for an Order of Certification under 28 U.S.C. § 1292(b) and plaintiff's response thereto.

The Court, upon considering the entire record of this case and being fully advised in the premises, hereby rules that defendants' Motion will be and the same is GRANTED.

In Accordance with this Court's Order of January 31, 1984,

IT IS ORDERED, ADJUDGED AND DECREED that this Court's October 28, 1983 Order, *Stanley v. United States*, 574 F.Supp. 474 (S.D. Fla. 1983), is certified by this Court pursuant to 28 U.S.C. § 1292(b) to involve a controlling question of law as to which there is substantial

ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

SO ORDERED.

DATED the 23rd day of February, 1984.

/s/ JOSE A. GONZALEZ
Jose A. Gonzalez
United States District Judge

Copies furnished to:

John Euler, Esq.
Alan Mishael, Esq.
John Romano, Esq.
James Mingle, Esq.

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 84-2018
No. 84-2019

JAMES B. STANLEY, PLAINTIFF-RESPONDENT,

v.

UNITED STATES OF AMERICA AND JOSEPH R. BERTINO, ET AL., DÈFENDANTS-PETITIONERS.

Appeal from the United States District Court for the Southern District of Florida

---

Filed APR 13, 1984

Before HILL, JOHNSON and HENDERSON, Circuit Judges.

BY THE COURT:

Presently pending before this court are motions by the Petitioners for interlocutory appeal from a district court order denying their motions to dismiss Respondent's complaint. Originally, Petitioners appealed the district court order under 28 U.S.C. § 1291 without first asking the district court to certify the case as appropriate for interlocutory review under 28 U.S.C. § 1292(b). After Respondent moved this court to dismiss the appeal, Petitioners asked the district court for section 1292(b) certification, which the court granted on January 31, 1984. Before the certification order was communicated to this court, however, we entered an order on February 3, 1984, granting Respondent's motion to dismiss the appeal. Peti-

tioners then requested the district court to enter a second certification order, which the court granted on February 27, 1984.[1] Relying this time on the certification order, Petitioners moved this court to exercise the discretion granted us by 28 U.S.C. § 1292(b) to review the "otherwise nonappealable" order denying their motion to dismiss the complaint. For the reasons set forth below, we grant Petitioners' motion for permission to appeal pursuant to 28 U.S.C. § 1292(b).

Section 1292(b) authorizes the district court to certify an interlocutory order as appropriate for immediate appeal, if (1) the order involves a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. It is undisputed that conditions (1) and (2) are satisfied: the issue of whether the *Feres* doctrine bars the *Bivens* claims is a "controlling question of law," because an affirmative answer to that question would require dismissal of Respondent's claims against Petitioners, *see Chappell v. Wallace*, 103 S. Ct. 2362 (1983); and there is "substantial ground for difference of opinion," because two circuit courts have disagreed with the district court's order in this case, *see Gaspard v. United States*, 713 F.2d 1097 (5th Cir. 1983), and *Jaffee v. United States*, 663 F.2d 1226 (3d Cir. 1981) (en banc).

Finally, we conclude that an immediate appeal from the order "may materially advance the ultimate termination of the litigation." From our cursory review of the record, it

[1] Since "the notice of appeal from a nonappealable order does not render void for lack of jurisdiction acts of the trial court taken in the interval between the filing of the notice and the dismissal of the appeal by either the district court or the appellate court," *United States v. Hitchmon*, 602 F.2d 689, 691 (5th Cir. 1979) (en banc), the district court was not without jurisdiction to enter the original certification order, *McLaughlin v. City of LaGrange*, 662 F.2d 1385, 1387 (11th Cir. 1981).

BEST

appears that the events on which Respondent bases his claims transpired in 1958. Because of the complexity of those claims, the number of defendants involved and the time that has passed since those happenings, it appears that any trial in this cause may well be complicated and time-consuming. The authorities cited above are sufficient to raise a serious question concerning the viability of Respondent's *Bivens* claims in light of *Feres* doctrine. The district court was well advised to certify this matter as appropriate for interlocutory review under 28 U.S.C. § 1292(b).

Accordingly, Petitioners' motions for interlocutory appeal are GRANTED.

AVAILABLE COPY

Supreme Court of the United States

No. 86-393

UNITED STATES, ET AL., PETITIONERS

v.

JAMES B. STANLEY, ET AL.

ORDER ALLOWING CERTIORARI. *Filed December 8, 1986.*

The petition herein filed for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit is granted.

U.S. GOVERNMENT PRINTING OFFICE: 1986—181-483/40503